No petition printed!

FILED
MAY 25 1954
HAROLD B. WILLEY, C

IN THE

Supreme Court of the United States

OCTOBER TERM—1953

347 U.S.
JAC-JO
19

No. 523 Misc.

BARRY JACOBS and JOHN DALE GREEN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

GEORGE B. DE LUCA,
District Attorney, Bronx County.

GEORGE TILZER,
WALTER E. DILLON,
JOHN B. LEE,
Assistant District Attorneys,
Of Counsel.

JUDICIAL PRINTING CO., INC., 82 Beekman St., N. Y.—BEekman 3-9084-5-6 182

INDEX

PAGE

Preliminary Statement 1

Facts 1

Proceedings in the Trial Court 4

The Questions Presented 6

Outline of Argument 6

POINT I—The issue as to whether the confessions were involuntary has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded 7

POINT II—The charge of the trial judge as to the criteria to be used by the jury in determining whether petitioners' confessions and oral statements were voluntary did not deny petitioners due process of law 11

POINT III—The trial court's refusal to charge, as requested by petitioners, does not present a substantial question 13

POINT IV—The denial of a change of venue did not prevent due process of law 14

POINT V—The trial and conviction of petitioners for the commission of the crime of Murder in the First Degree, by a special jury, pursuant to Section 749-aa of the Judiciary Law of the State of New York, did not deny to petitioners their rights under the Fourteenth Amendment of the Constitution of the United States 16

Conclusion 21

Appendix i

AUG 10 1955

217369

Cases Cited

	PAGE
Betts v. Brady, 316 U. S. 455	18
Brown v. New Jersey, 175 U. S. 172	18
Fay v. New York, 332 U. S. 261	17, 18, 20
Hall v. Johnson, 186 U. S. 480	17
Lyons v. Oklahoma, 322 U. S. 596	12
Moore v. New York, 333 U. S. 565	17
People v. Alex, 265 N. Y. 192	9
People v. Barbato, 254 N. Y. 170	9
People v. Buddensieck, 103 N. Y. 487	11
People v. Doran, 246 N. Y. 409, 416	9
People v. Hall, 169 N. Y. 184	17
People v. Lee, 300 N. Y. 422	11
People v. Mummiani, 258 N. Y. 394	9
People v. Trybus, 219 N. Y. 18, 23	9
People v. Weiner, 248 N. Y. 118, 122	9
People v. Weiss, 28 N. Y. S. 2d 435	16
Sheperd v. Florida, 341 U. S. 50	14
Snyder v. Massachusetts, 291 U. S. 97	18
Stein v. New York, 346 U. S. 156	10

Statutes Cited

PAGE

New York Code of Criminal Procedure Section 344 i

New York Judiciary Law Section 749-aa i

Texts Cited

Corpus Juris Secundum, Volume 50, Page 1026, Section 265 19

IN THE

Supreme Court of the United States

OCTOBER TERM—1953

No. 523 Misc.

BARRY JACOBS and JOHN DALE GREEN,
Petitioners,

against

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent.

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Preliminary Statement

Petitioners were convicted of the crime of Murder in the First Degree (Penal Law, Sec. 1044, subd. 1), by a judgment of the County Court, Bronx County, rendered January 8th, 1953, and were sentenced to death. The judgment of conviction was unanimously affirmed, without opinion, by the Court of Appeals (306 N. Y. 717, motion to amend remittitur granted, 306 N. Y. 758).

Facts

The deceased, William Hopkins, his wife Rose Hopkins and her parents, Alfred and Grace McCullagh, together spent the evening of August 1, 1952, at Rye, New York. Upon their return they intended to have some refreshments at the McCullagh home.

As they were about to enter the apartment house on Creston Avenue, in Bronx County, where the McCullaghs' resided, the deceased, his wife and her mother waited for Alfred McCullagh who was parking his automobile on the street a short distance from them.

While McCullagh was locking his car, petitioners, Barry Jacobs and John Dale Green approached him from behind. Jacobs pressed a gun into McCullagh's hip and ordered him to open the car door. McCullagh then noticed the deceased, William Hopkins, coming towards the automobile as he himself was being pushed into the driver's seat by Green, who later sat alongside of him.

Jacobs, gun in hand, took hold of deceased and forced him into the rear door of the car. Jacobs then sat on the back seat besides Hopkins.

In the meantime, McCullagh's wife, and his daughter came over to the car and asked McCullagh and the deceased where they were going. Jacobs, who had the gun in his hand, said, "tell them you will be right back." McCullagh then called out very loud, "we will be right back" (482-484).

The two women, however, remained at the car, and asked, "what is going on?". When they looked into the car, Jacobs again said to McCullagh, "get going". The women yelled, "where are you going, come on, get out of the car" (484-485).

Whereupon, Jacobs, who was in the rear seat, pointed his gun at the window. When the deceased, who was alongside of him, turned towards him, Jacobs pointed his gun at the deceased (485).

McCullagh then saw a flash and heard a shot. As he turned around to see what had happened, Jacobs pointed the gun directly at him, and "just fired away" (485).

Immediately after the shooting, petitioners jumped from the car and fled.

William Hopkins stepped out of the automobile and collapsed. A short time thereafter he was pronounced dead. The autopsy showed that the cause of death was a gun-shot wound in the left chest.

McCullagh was lying partly in and partly out of his car at the open front door on the driver's side. He was shot in the ear, the bullet going through the mastoid bone. His wound required confinement at a local hospital for five days.

About twenty minutes after the shooting, petitioner Barry Jacobs was apprehended on the roof of a building near the scene of the crime. He made a confession in which he stated in substance, that on the evening of August 1, 1952, he went to the home of petitioner John Dale Green; that Green furnished the gun; that they went into the bathroom of the Green home where they loaded the gun with nine bullets and then started for The Bronx; that he went into a drugstore and purchased a pair of sun glasses to use as a disguise; that their purpose was to steal a car for use in a robbery which they contemplated. Jacobs in his confession virtually admitted that he shot Hopkins and McCullagh as hereinabove described, by stating that he had the gun when he went into McCullagh's car and that he took it for granted he had fired the shots before he left the car and ran away.

The fatal gun was found around the corner from the shooting. It contained six empty shells and three live bullets.

The sun glasses were found in the automobile after the occurrence. Jacobs admitted they belonged to him. The glasses were later identified by one Joel M. Tuber, as having been sold by him to petitioner Jacobs, the night

before, in his drugstore in Brooklyn not far from the home of petitioner Green (545-546; 843-849; 956-959).

Petitioner John Dale Green was arrested at his home in Brooklyn, New York City, on the afternoon of the day of the shooting and was promptly brought to the police station in Bronx County where an investigation was being conducted. He likewise confessed.

The confessions of petitioners Jacobs and Green were orally made to Police Inspector Edward W. Byrnes and each confession was subsequently recorded by an Assistant District Attorney (953-972; 1327-1335; 1513-1566).

Neither of the petitioners took the stand at the trial.

Proceedings in the Trial Court

On August 2, 1952, the Grand Jury of Bronx County, State of New York, filed an indictment against the petitioners, Jacobs and Green, for the crime of Murder in the First Degree (22-24).

On August 26th, 1952, each of the petitioners pleaded not guilty to the indictment (25-26).

Thereafter, an application was made by the People in the County Court, Bronx County, for a special jury, pursuant to Section 749-aa of the Judiciary Law of the State of New York to try the issues.

The motion, which counsel for each of the petitioners opposed, was granted on October 2, 1952. The order entered thereon provided that a panel of one hundred fifty special jurors be drawn on October 15, 1952 (160-167).

Such a drawing was held and was supervised, as required, by a Justice of the Supreme Court of the State of New York. At the drawing each of the petitioners was represented by counsel and made no objection to the method of drawing.

On November 5, 1952, the petitioners, pursuant to Section 344 of the Code of Criminal Procedure of the State of New York, applied to the Supreme Court of the State of New York, Bronx County, for an order directing the removal of the action to another county for trial on the ground that a fair and impartial trial could not be had in the County of Bronx due to newspaper publicity about the crime and on the further claim that the majority of the jurors resided in an area not far removed from the place of the occurrence. The petitioners' application for a change of venue was denied by orders of said Court (19-21, 70-72). Supplemental Record on Appeal.

On November 7, 1952, petitioners served a formal written challenge to the panel of jurors, upon the following grounds:

1. That the County Clerk failed to properly determine whether all the persons designated as special jurors were eligible to serve as such.

2. That Section 749-aa of the Judiciary Law of the State of New York is in violation of Section I of the Fourteenth Amendment of the Constitution of the United States.

3. That the panel of jurors does not represent a fair cross-section of the community of the County of Bronx.

4. That the panel systematically excludes persons from serving upon the jury by reason of economic, racial or social standards (139-148, 155).

The challenge came on to be heard, and the minutes of the hearing can be found at pages 77-113, inclusive of the record on appeal (229-339).

At the conclusion of the hearing, the challenge was disallowed (337-339).

Following the disallowance of the challenge, a jury was duly selected and the petitioners tried on the indictment. The jury returned a verdict of guilty to the crime of Murder in the First Degree, as to each petitioner (2210-2214).

The Questions Presented

Whether petitioners' constitutional guarantee of due process of law was violated in the following respects:

1. By the admission in evidence of their confessions and oral statements.

2. By the charge of the trial court as to the criteria to be used by the jury in determining whether their confessions were voluntary.

3. By the refusal of the trial judge to charge, as requested, concerning their right not to testify.

4. By a denial of their application for a change of venue.

5. By the granting of a motion made by respondent for a special jury pursuant to Section 749-aa of the Judiciary Law of the State of New York.

6. By the denial of their challenge to the special jury panel.

7. By their trial before the special jury.

Outline of Argument

Each of the questions enumerated above will be answered herein seriatim.

POINT I

The issue as to whether the confessions were involuntary has been fairly tried and reviewed, and there is no indication that constitutional standards of judgment have been disregarded.

Petitioners contend that the confessions introduced against them were induced by threats and violence and were, therefore, involuntary and inadmissible.

Respondent maintains that the overwhelming evidence established that the confessions were clearly admissible.

The proof shows that the crime was committed at 12:45 A.M. on August 2, 1952. About twenty minutes later, Jacobs was found by the police on the roof of a building near the scene of the crime. He was hiding behind the dumbwaiter shaft (679-699).

The policemen noticed that Jacobs had a jacket over his arm. Having knowledge of the shooting which occurred only minutes before and not wishing to take any chances as to what Jacobs might have had under the jacket, the policemen rushed Jacobs and he was thrown against the dumbwaiter shaft. There was also a scuffle when the officers tried to take the coat from him (691-699).

This incident on the roof accounted for the slight abrasion that Jacobs had on his ear, which was the only visible mark that he had on him. It is not claimed that this episode had any direct relation to the securing of the confessions.

The oral confession of petitioner Jacobs was obtained by Deputy Police Inspector Edward W. Byrnes between 1:00 P. M. and 2:00 P. M. of the same day that this petitioner was arrested. Byrnes arrived at the police station at 9:30 A. M. and shortly thereafter spoke to Jacobs and to his mother, Mrs. Jacobs, who was at the police station.

At about 1:00 P. M. Jacobs asked to talk to his mother and his request was granted. The three of them sat down together and Inspector Byrnes narrated to the mother the facts of the crime. Jacobs confessed after his mother told him to tell the truth (944-948).

On the trial, Mrs. Jacobs testified that her son stated to her in the police station that he had been beaten. This witness, however, admitted that she did not see anybody strike her son (1673-1674; 1682-1683).

Petitioner Green was apprehended in his home in Brooklyn about 4:00 P. M. of the same day the crime was committed. His first oral confession was made in his home to one of the police officers within a few moments after he was arrested.

Green's wife testified that the officers beat and kicked her husband.

Every police officer who had contact with the petitioners was or could have been questioned about it by the defense at the trial. The police testimony was consistent and unshaken that no violence or threats were used. Their testimony was corroborated by an assistant district attorney who recorded the confessions of each petitioner in question and answer form.

A Correction Officer of the Department of Correction of the City of New York testified that on August 3, 1952, he was on duty in the detention pen at the Bronx Magistrate's Court; that after the petitioners were committed by the Magistrate presiding, they were turned over to him, together with commitments for them; that he did not see any marks, bruises, bleeding, cuts or any injury on them (1777-1781).

A physician, in the employ of the Department of Correction of the City of New York, testified that on August 4, 1952, he examined petitioner Barry Jacobs and found no

visible marks whatsoever on him; that the petitioner Jacobs complained of his nose, and he advised him to use some cold packs on it (1786-1788, 1791-1792).

The police investigation was concluded early in the evening of Saturday, August 2, 1952, which was the same day the shooting occurred.

The following morning, Sunday, the petitioners were brought before a magistrate. There is no evidence that either of the petitioners voiced any complaint to the magistrate that he had been mistreated by the police.

The answers given by petitioners in their recorded confessions gave the particulars of the murder which were corroborated by other evidence on the trial. A reading of the confessions indicates their voluntary nature.

As there was presented a fair question of fact as to whether or not the confessions were involuntary, the confessions were received and the issue was left to the jury, under proper instructions, for determination.

The procedure followed was in conformity with the law of New York dealing with confessions, so far as applicable to the instant case.

People v. *Barbato,* 254 N. Y. 170, 173;
People v. *Alex,* 265 N. Y. 192, 194-195;
People v. *Mummiani,* 258 N. Y. 394, 396, 411-412;
People v *Doran,* 246 N. Y. 409, 416;
People v. *Trybus,* 219 N. Y. 18, 23;
People v. *Weiner,* 248 N. Y. 118, 122.

In *People* v. *Doran, supra,* the Court of Appeals set forth the correct procedure at page 416, viz.:

> "Here was an issue of fact. Who was to decide it? The jury. They heard all the testimony, and the Court left it to them to say, after a very full and complete charge, whether or not the confession was

> voluntarily made, and instructed them that if they concluded that it was not voluntary, but had been obtained under the influence of fear produced by threats, they should throw it out of the case altogether, and disregard it. The judge told them that the People must prove and they must find it to be a voluntary confession before it could be received as evidence. This is not only according to the practice in this State in the trial of criminal cases, but is also the law. When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. * * *"

On the record of the case at bar, if the jury resolved that the confessions were admissible as a basis for conviction, there would be no violation of the Fourteenth Amendment (*Stein* v. *New York,* 346 U. S. 156).

By way of reassurance to this Court, which has always shown a deep sense of responsibility for protecting defendants in confession cases, attention is called to Exhibits 21, 22 and 23 in the Supplemental Record on Appeal. In fairness to petitioners, respondent must state that the said exhibits were not introduced on the trial. They were submitted by petitioners to the Court on their motion for a change of venue.

The exhibits were newspaper articles which included photographs taken by news photographers portraying petitioners as they appeared in the Magistrate's Court on Sunday morning, August 3, 1952, the day after the crime was committed.

Respondent submits that the photographs furnish demonstrative evidence that the jury made no mistake in rejecting petitioners' claim that their confessions were induced by violence.

POINT II

The charge of the trial judge as to the criteria to be used by the jury in determining whether petitioners' confessions and oral statements were voluntary did not deny petitioners due process of law.

In his instructions to the jury, the trial judge charged:

> "As men of sound judgment and general knowledge of public affairs, it is for you to say when men suspected of a homicide are in custody, whether their wishes and whims are to be respected, that they eat, sleep, rest and talk, if and when they desire.
>
> As reasonable men, it is for you to say whether the police and public officials, with full knowledge of the commission of a homicide, conduct their inquiry with a view to apprehending the perpetrators of crime, conditioned, however, on violating no fundamental or constitutional rights of anyone.
>
> Shall such inquiry be conducted with a view to detect crime and apprehend criminals irrespective of the sensitivity of individuals or the inconveniences they may be put to?" (2163-2165)

There is certainly nothing in this charge to justify the assertion made in the petition that the trial judge thus approved of pressure in obtaining confessions.

In the circumstances of this case, the Court's instruction was in all respects proper. Evidently petitioners were of the same view in the trial court because they took no exception to the charge and, therefore, could not be heard to complain on appeal (*People* v. *Buddensieck,* 103 N. Y. 487, 501; *People* v. *Lee,* 300 N. Y. 422, 424).

The reason the Court so charged the jury was because the mother of petitioner Jacobs testified that when she

saw her son in the police station, before he confessed, he complained to her that he was tired and hungry (1675-1676).

Mrs. Jacobs admitted that the police brought a sandwich and malted milk for her son and a sandwich and tea for her. She did not know whether her son was served the dinner which he had ordered before she left.

By its charge, the trial Court left it to the jury to determine whether there was any coercion such as that referred to in the testimony of Mrs. Jacobs. In view of the scope of the Court's instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment.

In *Lyons* v. *Oklahoma,* 322 U. S. 596, this Court said at page 601:

> "The mere questioning of a suspect while in the custody of police officers is not prohibited either as a matter of common law or due process. Lisenba v. California, 314 U. S. 219, 239-241; Wan v. United States, 266 U. S. 1, 14. The question of how specific an instruction in a state court must be upon the involuntary character of a confession is, as a matter of procedure or practice, solely for the courts of the state. When the state-approved instruction fairly raises the question of whether or not the challenged confession was voluntary, as this instruction did, the requirements of due process, under the Fourteenth Amendment, are satisfied and this Court will not require a modification of local practice to meet views that it might have as to the advantages of concreteness. The instruction given satisfies the legal requirements of the State of Oklahoma as to the particularity with which issues must be presented to its juries, Lyons v. State, 138 P. 2d 142, 164, and in view of the scope of that instruction, it was sufficient to preclude any claim of violation of the Fourteenth Amendment."

POINT III

The trial court's refusal to charge, as requested by petitioners, does not present a substantial question.

Petitioners argue that the trial judge in declining a request to charge thereby suggested to the jury that the petitioners should have taken the stand. The portion of the record on which petitioners predicate their contention reads as follows:

> "The Court: I have been requested to charge, number three; that the defendant has a right not to testify, and his falure to do so must not in any way cause you to determine that his failure to do so incriminates the defendant or causes you not to believe his defense. The Court declines to so charge.
>
> Mr. Brandenburg: Exception.
>
> Mr. Callahan: May the defendant Jacobs be deemed to have joined in the last request which your Honor declined to charge?
>
> The Court: Yes, you may.
>
> Mr. Brandenburg: Exception.
>
> Mr. Callahan: And may we also have the appropriate exception.
>
> The Court: You have it. Did I decline to so charge, except as already charged? The Court declines to so charge except as already charged" (2205-2206).

As part of the main charge, the trial judge had already given the following instruction to the jury:

> "In this case, the defendant, Barry Jacobs and the defendant, John Dale Green, failed to take the stand and testify as a witness in their own behalf. Under the law, a defendant has a right to do so, but his failure to take the stand and testify in his own behalf creates no presumption against him.
>
> The exact language of the statute pertaining thereto is as follows: 'The defendant as a witness:

> The defendant in all cases may testify as a witness in his own behalf, but his neglect or refusal to testify, does not create any presumption against him'" (2008-2009).

It is to be observed that when the trial judge declined the request to charge, he inadvertently failed to add that he had already covered the matter in his main charge. However, it appears that a moment later the judge noticed his oversight and immediately corrected the error.

Accordingly, petitioners' claim that the foregoing incident of the trial violated due process is without any substance.

POINT IV

The denial of a change of venue did not prevent due process of law.

Petitioners contend that the Court should have directed the removal of the action for trial in another county on the ground that a fair trial could not be had in the County of Bronx due to newspaper publicity concerning the crime.

This case is clearly distinguishable from *Sheperd* v. *Florida,* 341 U. S. 50, upon which petitioners rely, in that here the newspaper publicity relating to the crime "did not make a fair trial in the locality impossible" (*id.*).

The occurrence merely received the ordinary news coverage for an event of this kind during the week following the commission of the crime, to wit, August 2 to August 8, 1952.

The trial of the action was not commenced until three months later. In the meantime, only one newspaper published a brief inconspicuous item on August 27, 1952, reporting that petitioners had pleaded not guilty the preceding day.

No newspaper clippings were submitted by petitioners to substantiate their claim of a biased and inflamed press against them which would incite popular passion or prejudice so as to deprive them of a fair trial.

The minutes of the Voir Dire disclose that seventy-seven talesmen were questioned in the selection of a trial jury. Ten were excused by consent and five were excused for other reasons. Of the remaining sixty-two talesmen, twenty-three admitted they had read the newspaper stories, seven were not asked, and thirty-two declared that they did not read the articles.

Furthermore, ten of the twelve trial jurors selected for the trial stated that they had not read the news items. One juror said he had a recollection of reading the articles but he did not form any impression. The other juror remarked that while he had read the articles, he did not recall seeing any photographs and had formed no opinion. Both of these jurors, as well as the other ten, were satisfactory to petitioners.

The foregoing clearly demonstrates that petitioners were able to secure a jury that was not influenced by the newspaper accounts.

It is also urged by petitioners that the place of trial should have been changed because the majority of the special panel of jurors resided in the westerly sector of The Bronx, close to the situs of the crime. This contention is without support in fact.

The map of The Bronx annexed to the Supplemental Record on Appeal, which purports to pin-point the location of the various members of the special panel, does not indicate which parts of Bronx County were heavily congested and which sections were used for manufacturing and commercial purposes. Indeed, an examination of the map shows that there was a reasonable distribution of the talesmen on the special panel throughout the entire Bronx.

According to the brief of petitioner, Barry Jacobs, in the Court of Appeals, at page 18, only four of the trial jurors resided within a distance of a mile and a half of the locality of the homicide. None of the trial jurors, however, had their homes in the immediate vicinity of the crime.

As was aptly said in *People* v. *Weiss,* 28 N. Y. S. 2d 435, at page 436:

> "Our laws give to a defendant accused of murder a wide latitude in examining the qualifications of the individual prospective jurors. A defendant is provided with thirty peremptory challenges, an unlimited number of challenges for cause (Sec. 373, Code of Criminal Procedure) and ample means to select from the various walks of life, fair-minded, intelligent and unbiased judges of the facts who can discern and can divorce themselves from the prejudices which would inflict upon one defendant the ill effects of the sinister reputation of a codefendant. Judiciary Law, Sec. 749aa, sub. 2."

The record amply shows that the denial of petitioners' application for change of venue did not deprive them of their fundamental right to a fair trial.

POINT V

The trial and conviction of petitioners for the commission of the crime of Murder in the First Degree, by a special jury, pursuant to Section 749-aa of the Judiciary Law of the State of New York, did not deny to petitioners their rights under the Fourteenth Amendment of the Constitution of the United States.

With respect to Questions 5, 6 and 7, petitioners assert that their rights under the Fourteenth Amendment of the Constitution of the United States were violated by (a) the granting of the motion made by respondent for a special

jury pursuant to Section 749-aa of the Judiciary Law of the State of New York; (b) the denial of the challenge of petitioners to the special jury panel and (c) the trial of petitioners before the special jury.

This Court has twice explicitly held that the special jury statute herein involved (Judiciary Law, Section 749-aa) does not violate the principles of the Fourteenth Amendment [*Moore* v. *New York,* 333 U. S. 565; *Fay* v. *New York,* 332 U. S. 261; see also *Hall* v. *Johnson,* 186 U. S. 480 (dealing with predecessor statute, N. Y. Laws 1896, Ch. 378)].

Under this statute, a trial may be had before a special jury where the court finds that, for any reason, "the due, efficient and impartial administration of justice in the particular case would be advanced" thereby (Judiciary Law, Section 749-aa, subd. 4). The "importance or intricacy" of a case are two prime reasons for invoking a special jury (*id.*). Since it is obvious that no case is more important than a murder prosecution possibly entailing capital punishment, it is wisely held that this factor alone is sufficient to justify the use of a special jury [*People* v. *Hall* (1901), 169 N. Y. 184, 196-197].

In the case at bar, the supporting affidavit on the motion for a special jury alleged that it is important to the community that the guilt or innocence of petitioners be speedily determined; that because the charge was Murder in the First Degree, punishable by death, it is usually difficult to obtain without much delay ordinary jurors who do not possess conscientious opinions with respect to the death penalty. There was thus established the importance of the case and the fact that the due, efficient and impartial administration of justice in this case would be advanced by a trial before a special jury.

There is no substance, therefore, to the petitioners' claim that there were no allegations of facts sufficient to justify the ordering of a special jury. In any event, that

claim does not pose a constitutional question, since the Constitution does not regulate the modes of procedure in the State courts nor require them to be free from error beyond imposing conformity to traditional concepts of fairness (*Betts* v. *Brady,* 316 U. S. 455; *Snyder* v. *Massachusetts,* 291 U. S. 97; *Brown* v. *New Jersey,* 175 U. S. 172; *Fay* v. *New York, supra,* at p. 271).

Equally lacking in substance is the claim of petitioners that the special jury herein was selected arbitrarily and capriciously in derision of due process of law.

The specifications of this charge, as set forth in the petition, are (1) that the representation of negroes on the panel suggests that there was discrimination against colored persons in compiling the list of the special jurors and (2) that persons with questionable qualifications were placed on the list of special jurors from which the special panel herein was drawn.

The grounds urged in the petition were not specifically set forth in the written challenge submitted to the trial court.

To substantiate their challenge to the special panel, a full hearing was accorded to petitioners.

Upon the hearing of the challenge, the petitioners called one William F. Fischer, employed in the Bronx County Clerk's Office, Division of Jurors, who supervised the compiling of the list of special jurors. He was the only witness.

Fischer testified that under the law he was required to prepare a list of one thousand special jurors; that such a list was made up from the list of regular jurors. In answer to the questions of petitioners' counsel, Fischer fully explained the method of selecting the persons who were placed on the list of special jurors.

He also stated that there was drawn from the list of special jurors the panel of one hundred fifty jurors for the case at bar. It is to this special panel of one hundred fifty jurors that the challenge of petitioners was directed.

There was no attempt whatsoever made at the hearing to adduce any evidence that there was discrimination against race, creed or color in compiling the list of special jurors.

Notwithstanding the lack of proof to indicate that the County Clerk had any motive for discrimination, petitioners contend that there is a presumption of discrimination because under the system of making up the list of special jurors there was an opportunity to discriminate.

Respondent submits that such inference, without basis, is not warranted. As stated in 50 C. J. S., p. 1026, Section 265:

> "On a challenge to the array or motion to quash the venire, the burden is on the party presenting the challenge or motion to prove the facts alleged therein. It will be presumed, in the absence of evidence to the contrary, that the officers charged with the duty of selecting, drawing, and summoning the jury have acted faithfully and according to law, and the burden of showing the contrary is on the challenging party."

On page 19 of the petition herein, the United States Census figures for 1950 are set forth. Those figures show that there was at that time about one negro for every fourteen white persons in Bronx County.

Petitioners then state that on the Special Panel for this case there were one hundred forty-eight white talesmen and two negro talesmen.

Basing their argument on those figures, petitioners would have this Court deduce that there was only a token representation of negroes on the list of one thousand spe-

cial jurors. Obviously the inference, without proof, is unjustified. The fact that there were only two negroes on the special panel is in no way indicative of the percentage of negroes on the list of special jurors.

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a particular jury is not enough; there must be a clear showing that its absence was caused by discrimination, and in nearly all cases it has been shown to have persisted over many years. Virginia v. Rives, 100 U. S. 313, 322-23; Martin v. Texas, 200 U. S. 316, 320-321; Thomas v. Texas, 212 U. S. 278, 282; Smith v. Texas, 311 U. S. 128; Hill v. Texas, 316 U. S. 400; Akins v. Texas, supra. Also, when discrimination of an unconstitutional kind is alleged, the burden of proving it purposeful and intentional is on the defendant. Tarrance v. Florida, 188 U. S. 519; Martin v. Texas, 200 U. S. 316; Norris v. Alabama, 294 U. S. 587; Snowden v. Hughes, 321 U. S. 1, 8-9; Akins v. Texas, 325 U. S. 398, 400."
>
> *Fay* v. *New York, supra,* pp. 284-285.

The question, in the final analysis, is not what color the prospective juror is; it is rather whether the law or the practice systematically and purposely excludes or discriminates against any person because of race, color, creed or national origin. The evidence in this case is entirely lacking in this regard.

The other specification of the challenge raised in the petition, namely, that there were persons with questionable qualifications on the special panel, is likewise unfounded.

It appears from the testimony at the hearing on the challenge, that two jurors on their respective questionnaires had corrected certain answers made therein because they had misinterpreted the purport of the questions. This certainly does not warrant the criticism of petitioners that the intelligence of the talesmen was disregarded in compiling the list of special jurors.

Four other jurors on the panel had stated in their questionnaires that they were hard of hearing. There was testimony, however, that before their names were placed on the list of special jurors, the said talesmen had been given a practical test which established that their hearing deficiency was not sufficient to prevent them from effectively serving as jurors.

Due process, assuredly, does not require that jurors be infallible or physically perfect.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

GEORGE B. DE LUCA,
District Attorney,
Bronx County.

GEORGE TILZER,
WALTER E. DILLON,
JOHN B. LEE,
Assistant District Attorneys,
Of Counsel.

May, 1954.

APPENDIX

Section 344 of the Code of Criminal Procedure of the State of New York

Section 344 of the Code of Criminal Procedure of the State of New York reads as follows:

> "§ 344 When and in what cases, indictment may be removed before trial.
>
> A criminal action, prosecuted by indictment, may, at any time before trial on the application of the defendant or the district attorney, be removed from the court in which it is pending, as provided in this chapter, in the following cases:
>
> 1. From a county court to a term of the supreme court held in the same county, for good cause shown;
>
> 2. From the supreme court, or a county court, to a term of the supreme court held in another county, on the ground that a fair and impartial trial cannot be had in the county where the indictment is pending. When an action is ordered removed on application of the district attorney, the court granting such application may impose such appropriate conditions as it deems equitable to insure that such removal does not impose an unreasonable burden upon the defendant in making his defense. Any additional cost to the people incurred in compliance with such order shall be a county charge on the county in which the indictment was pending."

Section 749-aa of the Judiciary Law of the State of New York

§ 749-aa. Special jurors in certain counties

1. List of special jurors. The county clerk of each county of the state having a population of one million or more inhabitants, according to the last preceding federal census, shall select from the persons qualified to serve as

trial jurors in such county such number of special jurors as the justices of the appellate division of the supreme court, or a majority of them of the department in which such county is situated shall, from time to time direct. The names of the persons so selected liable to serve as special jurors shall be entered in suitable books alphabetically arranged, with their places of business and the residence of each. Such county clerk, from time to time, may cancel such selection and strike the names of such special jurors from such list and select other special jurors in their places. Persons who are selected as aforesaid by such clerk to act as special jurors shall be exempt from all other jury duty from and after the date of their selection, and they shall remain so exempt so long as they continue to be such special jurors.

2. Persons ineligible. No person shall be selected as such special juror who is by law disqualified or who claims and is allowed exemption from service as a trial juror, or who has been convicted of a criminal offense, or found guilty of fraud or other misconduct by the judgment of any civil court or who possesses such conscientious opinions with regard to the death penalty as would preclude his finding a defendant guilty if the crime charged be punishable with death, or who doubts his ability to lay aside an opinion or impression formed from newspaper reading or otherwise, or to render an impartial verdict upon the evidence, uninfluenced by any such opinion or impression, or whose opinion as to circumstantial evidence is such as would prevent his finding a verdict of guilty upon such evidence, or who avows such a prejudice against any law of the state as would preclude his finding a defendant guilty of a violation of such law, or who avows such a prejudice against any particular defense to a criminal charge as would prevent his giving a fair and impartial trial upon the merits of such defense, or who avows that he cannot in all cases give to a defendant who fails to testify

as a witness in his own behalf the full benefit of the statutory provision that such defendant's neglect or refusal to testify as a witness in his own behalf shall not create any presumption against him.

3. Examination as to fitness; subpoena; punishment for disobedience. No person shall be selected as a special juror until he shall have been examined personally by the county clerk, his deputy or secretary as to his qualification and fitness to serve as a special jurior. Such county clerk may issue a subpoena requiring any person within such county to attend before him, his deputy or secretary at a time specified for the purpose of testifying concerning the qualification or fitness of himself or any other person to serve as a special juror, and the propriety of the selection of such special juror. A person so subpoenaed must attend and testify accordingly. In case of his failure to attend and testify as required by such subpoena, or a refusal to be sworn, or to answer any legal or pertinent question, he shall be punished therefor by any justice of the supreme court as a contempt of court. All of the provisions of sections four hundred four through four hundred fourteen of the civil practice act, sections twenty-five and twenty-six of the civil rights law, are made applicable to the enforcement of the provisions of this subsection, except that no fees are required to be paid to any person so subpoenaed. The county clerk, in the record made by him of the jurors selected as such special jurors, shall enter the age of each special juror so selected, his business or vocation, if any, the length of his residence in the state and county and, if naturalized, the date of his naturalization. Such record shall be a public record and shall be open to inspection.

4. Application for special jury. Whenever an issue of fact has arisen in any civil or criminal action triable in a county embraced within the provisions of this section, the district attorney, or the defendant, if in a criminal action,

or either party in a civil action may apply for a special jury to try such issue. Such application may be made at any term of the supreme court appointed to be held within the county where such issue is triable, or at any term of any other court of record in which court such issue is to be tried. It must be upon the indictment, the plea thereto and an affidavit in a criminal action or the pleadings and affidavit in a civil action upon two days' notice to the adverse party or his attorney. Where, upon such application, it appears to the court that by reason of the importance or intricacy of the case, a special jury is required, or that the subject-matter of the indictment or the issue to be tried has been so widely commented upon that the court is satisfied that an ordinary jury cannot without delay and difficulty be obtained to try such issue, or that for any other reason the due, efficient and impartial administration of justice in the particular case would be advanced by the trial of such an issue by a special jury, the court to which the motion is made may make an order directing that such trial be had by a special jury, and such trial shall be had accordingly. The order must specify the time when the drawing of such special jury shall take place and the number of special jurors to be then drawn, the term of the court and particular day in the term when such special jury must attend. The day so specified for the attendance of the special jury must, except in the case of an order for additional special jurors drawn under subsection six of this section, be at least five days in addition to any Sunday, holiday or half-holiday, after the day specified for the drawing of the special jury.

5. Drawing; notification of jurors. At the time specified in the order the special jury shall be drawn at the office of the county clerk as provided in section six hundred and two of this chapter. A minute of the drawing must be kept by the county clerk, or his deputy, which must be entitled in the action in which the jury is to serve specifying the

term of court and the particular day in the term when the special jurors so drawn must attend; and there must be entered thereon the name of each juror drawn. Such minute must be signed by the judge or justice and by the county clerk, or his deputy, present at the drawing and such minute so signed must be filed in the office of such county clerk. Such county clerk must notify each juror therein named in the manner provided for trial jurors, except that provisions as to intervals of time with regard to the notification of trial jurors shall not apply. Before the day specified for the attendance of the special jurors the county clerk must file with the clerk of the trial court, part or term at which the juror is required to attend, a certified copy of the minute with a return indorsed thereon or annexed thereto specifying the manner in which each juror was notified and the time and place of the service of such notice. Such return shall be presumptive evidence of the fact of such service. An affidavit of the person by whom such service shall have been made, stating the manner, time and place of such service shall accompany such return.

6 Additional jurors; drawing. If the panel of the special jurors thus drawn shall be exhausted before a jury is completed, or if the trial court shall be of the opinion that additional special jurors will probably be needed to complete the jury, the trial court may, from time to time, direct that such additional special jurors be drawn for the trial as it may deem expedient. The order must specify the number to be drawn, the time of the drawing and the time when such additional jurors shall be required and notified to attend. Such additional drawing shall be made by the same officers authorized to draw the special jurors, either in open court in the presence of the judge or justice presiding at the trial, or at the office of the county clerk as prescribed in such order, and shall be conducted in the same manner as the original drawing and a minute thereof kept

and certified as prescribed for the original drawing and the jurors so drawn shall be summoned in the same manner as those originally drawn.

7. Challenges; trial. The parties to such an action shall have the same number of peremptory challenges and the same challenges for cause to be tried in the same manner as upon a trial with an ordinary jury. The rulings of the trial court, however, in admitting or excluding evidence upon the trial of any challenge for actual bias shall not be the subject of exception. Such rulings and the allowance or disallowance of the challenge shall be final. Upon the formation of a special jury as hereinbefore provided the issue must be tried by such jury as prescribed by the code of criminal procedure or the civil practice act with respect to a jury trial in a criminal or civil action with an ordinary jury.

8. Revision of list. In each county of the state to which this section applies, the names selected and composing the special jury list heretofore compiled, shall be the special jury list for such county subject to such revision thereof by striking therefrom and adding thereto the names of such jurors as from time to time the county clerk shall deem proper.

9. Appellate division to make rules. The justices of the appellate division of the supreme court of the department embracing the county in which such special jury list shall be constituted shall make such rules and regulations not inconsistent with the provisions of this section as shall be necessary to regulate the making of the application for a special jury under the provisions of this section for the drawing and attendance of such jurors and for the proper and efficient enforcement of the provisions of this section.

10. Violations of section or rules, penalty. Any violation of this section, or of such rules and regulations prescribed by the appellate division of the supreme court shall be deemed a contempt of court under section seven hundred fifty of the judiciary law and such rules and regulations may be enforced as if a violation thereof were such a contempt as provided by section seven hundred fifty-one of the judiciary law. Added L.1938, c. 552, § 16; amended L.1939, c. 40; L.1940, c. 202, § 14; L.1941, c.402; L.1942, c. 799, § 12, eff. May 11, 1942.